In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 705

WILLIAM C. RAMSEY and CHARLES E. STENICKA, JR., Trustees of Sterling Manufacturing Company, Debtor, under Chapter X of the Bankruptcy Act, *Petitioners*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims.

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Government respectfully invites the attention of the Court to the following facts which suggest that the petition for certiorari was filed out of time.

On December 4, 1951, the Court of Claims entered judgment granting the Government's motion for judgment on the pleadings (R. 24). On January 24, 1952, within an extended period of time

allowed by that court, petitioner filed a "Motion for Leave to File an Amended and Substituted Petition" (R. 25). On February 26, 1952, the court below overruled petitioner's motion without opinion (R. 69). The petition for certiorari was filed on April 12, 1952.

Since the petition for certiorari was filed more than 90 days after the entry of the final judgment which granted the Government's motion for judgment on the pleadings, it is apparent that the petition was not filed within the time specified by 28 U.S.C. 2101(c) unless the motion filed on January 24, 1952, tolled the running of the statutory period. There is no doubt that the running of the ninety-day period is postponed by the timely filing of any of the three motions which may be filed as of right after judgment in the Court of Claims, i.e., "a motion for a rehearing or a motion to alter or amend a judgment or a motion to grant a new trial". Rule 53(c) of the Court of Claims. The motion filed on January 24, 1952, was not such a motion. It was a motion applying for leave from the court below to file an amended complaint. Such an application for leave "does not suspend the running of the ninety days." *Morse* v. *United States,* 270 U.S. 151, 154; *Gypsy Oil Company* v. *Escoe,* 275 U.S. 498.

Petitioner cannot escape the statutory requirement by attempting to treat the date of overruling of his motion for leave to file the amended complaint as the beginning of a new ninety-day period.

Since it is "clearly within the discretion of the court to refuse leave to file" such a complaint, such a refusal cannot serve as an independent ground for appeal. *Ind. & S. R. R. Co.* v. *L. L. & G. Ins. Co.*, 109 U.S. 168, 172. In this connection, it should be noted that the petition for certiorari, despite petitioner's intimation to the contrary (Pet. 1-2), seeks review of the identical issues which were considered and rejected by the court below in its December 4, 1951, opinion and final judgment (R. 15-24).

It is respectfully submitted that the petition for certiorari should be denied for the foregoing reason.[1]

PHILIP B. PERLMAN,
Solicitor General.

JUNE, 1952.

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[1] Should it be held that the petition for certiorari was timely filed, it is respectfully submitted that the petition asserts no conflict of decisions and presents no novel or important questions warranting further review. All of petitioner's arguments on the merits are fully answered in the opinion of the court below (R. 15-24).

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